In the Supreme Court of the United States

October Term, 1943

No. 440

ROSE M. O'HARA, Petitioner

vs.

MAURICE J. MURPHY, Special Administrator, et al.
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF

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INDEX

	Page
Petition	1
Statement of Matter Involved	1-8
Questions Presented	1-8
Reason for Granting the Writ of Certiorari	8-9
Brief in Support of Petition	9-18
Conclusion	18

TABLE OF AUTHORITIES

	Page
Adoe vs. *Spencer*, 56 L. R. A. 817 at 830	14
Allen-West Com. Co. vs. *Grumbles et ux*, 129 F. 287, (63 C. C. A. 401 8th Cir.)	14
Article 5 of Amendment to Constitution of U. S.	9
Bagley vs. *Bagley*, 57 R. I. 186	14
Bergey's Appeal, 60 Pa. 408	13
Bolen Coal Co. vs. *Hicks*, 190 F. 717, 111 C. C. A. 445	12
Botchford vs. *Com. Int. Rev.*, 81 Fed. (2d) 914 C. C. A. 9th	15
urton et al. vs. *Platten* (C. C. A. 7th Cir.)	16
M. A. Carpenter vs. *D. L. Carpenter*, 105 A. L. R. 386	13, 14
Colangelo vs. *Colangelo*, 46 R. I. 139	14
Cornell vs. *Kettelle*, 62 R. I. 128, 137	14
Cunard S. S. Co. Ltd. vs. *Kelley, et al.*, Cir. App. 1st Cir., 126 F. 610	11
Daniels Chancery, Sec. 100, page 101	13
DaRosa vs. *First Natl. Stores, Inc.*, 62 R. I. 213	12
Grable vs. *Moyer*, 45 Pa. 533	13
Grey vs. *Grey*, 47 N. Y. 552	13
Hurtado vs. *California*, 110 U. S. 535	15
Jannings vs. *Davis*, 31 Conn. 138	13
Johnson Chancery Reports, 86-114	13
Kim vs. *Snyder*, C. C. A. 7th Cir., 145, 327 at 329	12
Manning vs. *Mutual Life Ins. Company*, 100 U. S. 693, 697	11
Midland Valley R. Co. vs. *Fulgham*, 191 F. 91 (104 C. C. A. 151)	12
Peoples Savings Bank vs. *Ryan*, 57 R. I. 411	15
Rice on Evidence, Vol. II, p. 990	13
Stickney vs. *Stickney*, 131 U. S. 227	5
Story Eq. Jur., Sec. 1395, 1396	13
Texas & Pacific Railroad vs. *Gentry*, 163 U. S. 196	12
U. S. vs. *Ross*, 92 U. S. 281, 284	10
U. S. Fidelity & Guaranty Co. vs. *Des Moines Natl. Bank*, 145 F. 273, 74 C. C. A. 553 (8th)	12

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The petitioner, Rose M. O'Hara, prays for a writ of certiorari to review the final judgment of the Circuit Court of Appeals, First Circuit, entered on July 9, 1943, confirming the Judgment of the United States District Court for the District of Massachusetts against the petitioner and in favor of the respondent.

STATEMENT OF MATTER INVOLVED

1. This case was brought under the Federal Interpleader Act (43 Stat. 976; 28 U. S. C. A. Section 41 (26)) and involves the ownership of two life insurance policies which became the sole property of Mrs. O'Hara, widow of the late

Walter E. O'Hara, on May 2, 1939. The matter was referred to a Master and he made the following finding:

> "I rule on the facts found by me, as hereinbefore recited, that when O'Hara" (meaning Walter E. O'Hara) "delivered the policies to Rose M. O'Hara, then Rose G. MacLaughlin, that evening in May 1939, title thereto was transferred and vested in the latter.
>
> ". . . I further rule on the facts found by me as hereinbefore recited, that Mrs. O'Hara did nothing which divested her of her title to the policies prior to September 21, 1940."

The Master also found that on September 21, 1940, Rose M. O'Hara *delivered* the policies to Messrs. Kilbourne and Broadbent, agents of the late Walter E. O'Hara, and that in doing so she thereby gave up all her vested interest therein.

These findings have been affirmed by the District Court and also later by the Circuit Court of Appeals for the First Circuit. Thus it is judicially established that the two said insurance policies became and were the sole property of Mrs. Rose M. O'Hara on May 2, 1939 and that said policies remained her sole property up to and inclusive of the day of September 21, 1940; also that she lost her title on Sept. 21, 1940.

Both said policies contained the following endorsement:

> "If this policy shall mature as a death claim, the proceeds shall be payable to my intended wife, Rose G. McLaughlin, if living, otherwise to my executors or administrators." (Exhibit 3)

Subsequent to the marriage of Mr. and Mrs. O'Hara which occurred on June 14, 1940, both policies were endorsed again with a change of name in the beneficiary clause so that the married name of Rose M. O'Hara, wife of Walter E. O'Hara, was substituted for the name of Rose G. MacLaughlin.

The respondent, Maurice J. Murphy, Special Administrator, filed no objection to the Master's findings and to the District Court's affirmation thereof that the policies became the sole property of Mrs. O'Hara (then Rose G. MacLaughlin) and that title thereto was vested in the latter. The District Court held that Maurice J. Murphy, respondent, assented thereto.

The Master then proceeded to make another finding which took the said policies away from Mrs. O'Hara. The finding is as follows:

> "I further find that the policies were given up pursuant to arrangements worked out between counsel for the return of such property as each possessed and was claimed by the other in connection with which it was agreed that the policies claimed by O'Hara should be returned to him."

There was no evidence introduced at the hearing nor is there any now contained in the record supporting such a finding! This case does not present a question of whether or not there is credible or conflicting evidence on this point. Your petitioner maintains and is ready to show this Honorable Court that there is no evidence in the record supporting the above finding.

Mrs. O'Hara also contended that she entered into an antenuptial contract with her husband whereby her husband agreed with her that if she would agree on a definite date of marriage, and would give up her lucrative position (which she had for twenty years and through which she earned an average of $4,000. per annum) and agree to provide for his aged parents, if they survived him, he would keep the said policies in force and through them keep Mrs. O'Hara, his wife, financially protected in the event she should survive him. In pursuance of that agreement Mrs. O'Hara did give up her position and thus her independent means of support

and assumed all the aforesaid obligations and performed her part of the agreement in all other respects. Mrs. O'Hara's performance as aforesaid is now judicially determined.

The Master refused to find an antenuptial contract as claimed by Mrs. O'Hara even though there was absolutely no evidence introduced in contradiction thereof. There is not a scintilla of evidence in the record which either denies or impeaches her evidence in the slightest degree on this point.

The District Court in affirming the finding of the Master interpreted the language and findings of the Master to mean that the alleged return of the policies by Mrs. O'Hara to her husband on September 21, 1940, was a "gift back" by Mrs. O'Hara to her husband.

The District Court does not embody an analysis nor does it contain a discussion of the evidence in its opinion. It affirms the findings of the Master *in toto*. We maintain that any attempt to deal with the evidence will produce a stone wall against the logic of the Master.

The United States Circuit Court of Appeals for the First Circuit in its review of the opinion of the said District Court and the Master's Report held

> "the sole issue is whether the appellant 'relinquished' all her rights in the two insurance policies given her by her late husband on May 2, 1939, by returning them to him on September 21, 1940 . . . "

and held that in returning the policies on September 21, 1940, Mrs. O'Hara "relinquished all her rights in the policies on the latter date". The Circuit Court does not analyze the evidence but affirms *in toto* the Master's findings. An analysis of the evidence will clearly show that the Master's conclusions *cannot* be arrived at.

The Circuit Court makes reference to Mrs. O'Hara's claim that she entered into an antenuptial contract with her hus-

band, as aforesaid, and that she was to receive financial protection through the insurance policies so long as she remained his wife. This phase of the case is entirely disregarded by the opinion of the U. S. Circuit Court for the First Circuit.

Upon examination, it is clear that there is not a scintilla of evidence in the entire record which supports the claim that Mrs. O'Hara made a "gift" of the policies to her husband, Walter E. O'Hara, on September 21, 1940. When we say there is no testimony we do not just mean to say that there isn't creditable supporting or conflicting testimony on this most important question. We firmly contend there is absolutely no legal evidence whatsoever present which in any manner affords even the slightest degree of support to the finding that Mrs. O'Hara made a "gift" of the policies to her husband on September 21, 1940. The presumption of law is also against such a gift in absence of clear, positive and direct proof.

In the case of *Stickney* vs. *Stickney*, 131 U. S. 227, the Supreme Court of the United States held:

> "... We think that whenever a husband acquires possession of the separate property of his wife, whether with or without her consent, he must be deemed to hold it in trust for her benefit in the absence of any direct evidence that she intended to make a gift of it to him. ...."

There is also absolutely no testimony in the record upon which can be predicated the Master's finding that "the policies were given up pursuant to arrangements worked out between counsel". The record upon examination will definitely prove conclusively to the contrary. The Master based his finding upon a series of inferences, and each inference is drawn from a preceding inference and none of them have any foundation in fact.

The Master, as a matter of fact, did not define the return of the policies as a gift from Mrs. O'Hara to her husband. The Master held the alleged return was a return based upon an arrangement agreed upon by the respective counsel of the parties as indicated above. The District Court of its own volition interpreted the language of the Master to mean a "gift back" from Mrs. O'Hara to her husband.

The Circuit Court in its opinion defines the alleged return of the policies on September 21st by Mrs. O'Hara to her husband as a "relinquishment" of her rights therein. The Circuit Court does not use the word "gift". It interprets the Master's language to mean a "relinquishment of the policies".

This latter interpretation of the alleged delivery of the policies on September 21st presents an entirely different basis than that adopted by the District Court or by the Master respectively. The word "relinquished" as used apparently must be taken to mean that Mrs. O'Hara gave up her rights to the policies or abandoned her ownership of them to her husband. There is no evidence anywhere in the record supporting such a basis. The record is totally void of such legal evidence to support such a conclusion.

The only testimony in the entire record bearing upon the return of the policies on September 21, is a statement of a witness, John Broadbent, who claimed that on September 21, Mrs. O'Hara delivered a sealed envelope in his presence to another witness named, Walter Kilbourne; that after Broadbent left the home of Mrs. O'Hara, he got the envelope from Mr. Kilbourne and ripped it open; that he, Broadbent, then for the first time saw the two insurance policies in the envelope and that subsequently the opened envelope containing the policies and other papers were delivered to Mr. O'Hara in Fall River. The only other supporting testimony bearing on the alleged return of the policies was that of Mr. Patrick Harrington. He was the attorney for the late Walter E.

O'Hara during his lifetime. He admitted he has a large personal claim against the Estate of Walter E. O'Hara and also that he now represents creditors against the said estate aggregating about $20,000. He was forced to admit that he has a personal interest, amounting to close to $10,000., at stake in this case and is desirous of seeing that Mrs. O'Hara loses her case. Without the insurance policies becoming part of the Estate of Walter E. O'Hara, Mr. Harrington can have no hope of any payment on his personal claim or the claims of his clients. The O'Hara Estate is insolvent even with the insurance money becoming part of the estate.

Mr. Harrington's testimony was that he saw the policies on the afternoon of September 21 in the possession of Walter E. O'Hara. The witness Broadbent admitted that the said sealed envelope was delivered into the possession of said Walter Kilbourne. Walter Kilbourne, on the other hand, flatly denied that the sealed envelope he received contained the insurance policies. Mrs. O'Hara likewise denied that she gave any policies to Mr. Kilbourne or Broadbent on September 21st. She did admit she gave Mr. Kilbourne a sealed envelope which contained other valuable papers for Mr. O'Hara on September 21st. We admit that the record contains a conflict of evidence regarding a delivery of the policies on September 21st.

It is judicially established that on Sept. 21, 1940 Walter O'Hara wrote his wife as follows:—

> "Darling . . . I love you with all my heart, and my absence from you is doing nothing short of killing me. *So you can keep the insurance* policies. *I rather that you had the proceeds than anyone else in the world.*
>
> Your loving husband
>
> Walter"

The mere delivery as found by the Master in his report and affirmed by the District Court does not in and of itself prove

the making of a gift from a wife to her husband. Much greater and stronger proof is required by law. There is no testimony except the above which offers a basis for the finding that Mrs. O'Hara made a "gift" of the policies to her husband, Walter E. O'Hara. Mrs. O'Hara admitted giving the policies to her husband on September 22nd but stated it was for the express purpose of paying off certain loans which existed on the said policies and which she provided money for. It is judicially established that Mrs. O'Hara actually did give her husband money for the sole purpose of paying off the said loans. Her husband, instead of using the policies for the express purpose for which the policies were entrusted to him, proceeded after he got possession of the policies to remove his wife as beneficiary and substituted his estate as beneficiary in her place. He never paid the loans off, and thus Mrs. O'Hara also lost the money she gave him for that purpose as the matter now stands.

We respectfully maintain the decree as entered by the U. S. Circuit Court is in violation of Article 5 of the Amendment to the Constitution of the United States.

REASON FOR GRANTING THE WRIT OF CERTIORARI

The sole question before the court is whether Mrs. O'Hara has had the said insurance policies judicially decreed as her property taken away from her in violation of Article 5 of the Amendment to the Constitution of the United States which contains the following provision:

> "No person shall be . . . deprived of life, liberty or property, without due process of law; . . . ."

We respectfully maintain that if Mrs. O'Hara's property (the said insurance policies) has been decreed the property

of the Estate of Walter E. O'Hara without any legal evidence to support such a decree, then in that event her constitutional right as provided by Article 5 of the Amendment to the Constitution is being violated.

This is not a case involving judicial error or a miscarriage of justice as for example where a decision is made or judgment is entered contrary to the evidence or the weight thereof. In this case we firmly maintain there is no legal evidence; not even a scintilla of such evidence which will support a finding that Mrs. O'Hara made a "gift" of her property to her husband, or that she "relinquished" or abandoned her rights therein to her husband.

We respectfully contend that the judgment entered is also in violation of the law of the land as laid down by this Honorable Court in the case of *Stickney* vs. *Stickney* (*supra*).

Your petitioner respectfully requests that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals, First Circuit, affirming the decree of the United States District Court for the District of Massachusetts be granted.

Respectfully submitted,

WALTER I. SUNDLUN,
WILLIAM C. CROSSLEY,

Attorneys for Petitioner

BRIEF IN SUPPORT OF PETITION

The opinion of the Circuit Court of Appeals, First Circuit, was handed down on July 9, 1943. It holds in part as follows:

> ". . . The sole issue is whether the appellant relinquished all rights in two policies given to her by her late husband,

> Walter E. O'Hara, on May 2, 1939 by returning them on September 21, 1940 . . . It is not necessary to summarize the facts. The master's report and opinion of the district court adequately state them. The Master had before him direct and positive testimony to the effect that Mrs. O'Hara returned the policies in question to her husband on September 21, 1940 and he concluded that she completely relinquished all her rights in them on that date. . . ."

The Circuit Court in no other manner makes an analysis of the evidence. It affirms the finding of the Master, even though it is an unquestioned fact that the Master based his opinion upon a series of inferences, each inference being drawn from a preceding one and all of them being without any foundation in fact or supporting legal evidence.

The instant case is based on an action which is equitable in nature and thus both questions of law and questions of fact can be examined by this Honorable Court.

We humbly petition this court that the evidence be examined, and to apply the established law of the land. *If there is any legal evidence to establish a "gift" from Mrs. O'Hara to her husband, there should be no difficulty in pointing out the page or the question and answer in the record where such evidence appears!* Your petitioner will be content if that is done —but we firmly say that there is no such evidence in the record; and thus the judgment now entered stands without any legal foundation therefor. Her property is being taken from her without any legal basis therefor.

The Circuit Court has not given any effect to the law of the land as laid down by this Honorable Court.

In the case of

U. S. vs. *Ross*, 92 U. S., 281, 284:

the Supreme Court of the United States held:—

> "There are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliably drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved and not themselves presumed. . . . The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences."

In the case of

> *Manning* vs. *Mutual Life Insurance Company,* 100 U. S. 693, 697

the court held

> ". . . But the presumed fact must have an immediate connection with or relation to the established fact from which it is inferred. If it has not, it is regarded as too remote. The only presumptions of fact which the law recognizes are immediate inferences from facts proved. . . ."

In the case of

> *Cunard S. S. Co. Ltd.* vs. *Kelley, et al,* Cir. App. 1st Cir., 126 F. 610,

the court held

> ". . . The judgment of a jury must be based upon the evidence in the case. While they may draw legitimate inferences, they may not wander into the field of imagination of remote possibilities. It cannot adopt an inference from a few of the proven facts when that inference is absolutely inconsistent with and is repelled by other equally well-proven facts."

In the recent case of

DaRosa vs. *First Natl. Stores, Inc.*, 62 R. I. 213

the R. I. Supreme Court rejected a verdict based upon two inferences and held

> ". . . A jury is not permitted to indulge in such a series of inferences with only remote direct evidence upon which to support it."

This principle of law is supported by

Texas & Pacific Railroad vs. *Gentry*, 163 U. S. 196.

The Master admits that many of his findings are based upon inferences from circumstances and probabilities. (M. R. 66, 68.)

In the case of

Kim vs. *Snyder*, C. C. A. 7th Cir. 145, 327 at 329,

the Circuit Court held:

> ". . . Mere conjecture will not sustain verdicts. They must be founded on evidence which convinces the mind. They cannot rest on mere guess or speculation." (*Spencer* vs. *Railway Co.*, Wis. 311, 313.)
>
> *Midland Valley R. Co.* vs. *Fulgham*, 191 F. 91 (104 C. C. A. 151).
>
> *Bolen Coal Co.* vs. *Hicks*, 190 F. 717, 111 C. C. A. 445.
>
> "A theory cannot be established in a civil action of circumstantial evidence, unless the facts relied on are such that it is the only conclusion that can be reasonably drawn from them." (*U. S. Fidelity & Guaranty Co.* vs. *Des Moines Natl. Bank*, 145 F. 273, 74 C. C. A. 553 (8th)

Likewise the U. S. Circuit Court, First Circuit, by its opinion disregards the law of the land as decreed by this Honorable Court in the case of *Stickney* vs. *Stickney*, 131 U. S. 327, *supra*.

The opinion of the *Stickney* case is followed by all other courts of last resort. The Supreme Court of Pennsylvania said in

Grable vs. *Moyer,* 45 Pa. 533

". . . It lies upon one who asserts it to be the property of the husband to prove a transmission of the title either by gift or contract for value, for the law does not transmit it without the act of the parties. . . . Nothing is more easy than for a husband to obtain possession, even against the consent of a wife, and where he obtains it with her consent, it can be at most but slight evidence of a gift."

Eminent authorities hold "such gifts" (wife to husband) "are never to be inferred".

Daniels Chancery, Sec. 100, page 101
Story Eq. Jur., Sec. 1395, 1396
Johnson Chancery Reports, 86-114

The Supreme Court of Pennsylvania in considering a similar question said in the case of

Bergey's Appeal, 60 Pa. 408

"She (the wife) was not bound to attempt to rescue it from him, or proclaim that it was not a gift. . . . The presumption is that he (the husband) received it for his wife . . . for her sole and separate use. . . . He should be compelled to account in equity." (The unquoted words inserted by us.)

M. A. Carpenter vs. *D. L. Carpenter,* 105 A. L. R. 386

"The presumption is against gift. It must be established beyond suspicion." Rice on Evidence, p. 990, Vol. II.

Grey vs. *Grey,* 47 N. Y. 552:
Jannings vs. *Davis,* 31 Conn. 138

The Court held in the case of

Adoe vs. *Spencer*, 56 L. R. A. 817 at 830

> "There seems no reason in common sense, that, when a husband takes of the principal of his wife's estate into his possession, he should be presumed to acquire it as his own unless she has exacted some evidence in writing or an express agreement by him otherwise. There are many reasons why the rule should be the reverse of this and that such a taking should be deemed a loan to him unless he prove otherwise. In equity surely, no other rule should obtain."

In the case of

Colangelo vs. *Colangelo*, 46 R. I. 139,

the Supreme Court of Rhode Island held:

> "Where the money delivered by a wife to her husband constituted the corpus of her whole estate, on action by wife to recover, charge that under the circumstances of the case, the burden was on defendant husband to show that the transaction was a gift and not a loan was correct. . . . "

The respondent offered *no evidence* in the instant case to sustain this burden!

Bagley vs. *Bagley*, 57 R. I. 186
Cornell vs. *Kettelle*, 62 R. I. 128, 137.

The courts have universally held as follows:

> "The evidence to prove a gift must be clear and convincing and every essential element of a gift must be proved."

Carpenter vs. *Carpenter*, 105 A. L. R. 386. (R. C. L. Gifts—45).

In the case of

Allen-West Com. Co. vs. *Grumbles et ux*, 129 F. 287 (63 C. C. A. 401 8th Cir).

Sanborn, Circuit Judge for the court held

> "In every case of an alleged gift, the burden of proof is upon the donee to establish a complete and valid donation. . . . Among the indispensable conditions of a valid gift are the intention of the donor to absolutely and irrevocably divest himself of the title dominion and control of the subject of the gift in praesenti at the very time he undertakes to make the gift. *Botchford* vs. *Com. Internal Revenue*, 81 F. (2d) 914, C. C. A. 9th; *Peoples Savings Bank* vs. *Ryan*, 57 R. I. 411."

The record of the instant case will not produce any evidence which the above stated law demands.

It is judicially decreed in this case that Mr. O'Hara dealt deceitfully and treacherously with his wife in many instances and it therefore follows his special administrator does not come into court "with clean hands" in the instant case.

If the findings of the Master which are based upon a series of inferences and none of which have any foundation in fact are to form the basis for taking away from Mrs. O'Hara—(a wife) her property and thus practically leave her almost penniless, and if upon such findings a wife is to be held to have made a "gift" of her property to her husband—then all the law as laid down by this Honorable Court in the case of *Stickney* v. *Stickney* and by other courts of last resort in determining the legal requisites to sustain a gift from a wife to a husband is of no avail. A wife under such circumstances is clearly left without the protection intended for her by this Honorable Supreme Court and other courts of last resort in like cases.

In the case of

Hurtado vs. *California*, 110 U. S., 535

this Court held:

> "And the words 'due process of law' in the Amendment . . . do mean in its regular course of administration according to prescribed forms, and in accordance with the general rules for the protection of individual rights."

Clearly "general rules for the protection of individual rights" must mean that only legal evidence such as this court and other courts of last resort require to prove and establish a gift from a wife to a husband must be present in the record of the case to sustain the finding that Mrs. O'Hara made a gift to her husband.

Clearly it is not contemplated by the *Hurtado* case that such a finding can be made if there is no such evidence supporting the same; nor does it contemplate that the speculative deductions, all of which are of a master, based upon a series of inferences and none of which have any foundation in fact, can form the basis for maintaining a gift from a wife to a husband.

It is held in the *Hurtado* case also—that the "requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings."

The settled course of judicial procedings demands the introduction of legal evidence to support a finding that a wife made a "gift" to her husband.

In the instant case the judicial proceedings to date do not include the presentation or introduction of any such evidence. There is just no such evidence in the record!

In the case of

Burton et al vs. *Platten* (C. C. A. 7th Circuit)

Sanborn, Circuit Judge, held

> "It is a principle that lies at the foundation of all just government that no man shall be deprived of his life, lib-

> erty, or property without due process of law. Every disregard of this principle by courts, legislatures, or citizens tends directly toward distrust, insecurity, disorder, and anarchy. It may be difficult, perhaps impracticable, to give a definition of 'due process of law' which would comprehend all cases as they arise, and it is certainly unnecessary to do so. Chancellor Kent says: 'The better and larger definition of "due process of law" is that it means law in its regular administration through courts of justice.' 2 Kent, Comm. 13. Certain it is that, in judicial proceedings, due process of law must be a course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. It must be one that is appropriate to the case, and just to the parties affected. It must be pursued in the ordinary manner prescribed by the law. . . ."

The instant case has not been pursued in accordance with the prescribed law. The deision made in the instant case is not in pursuance of judicial proceedings for in not requiring legal evidence to sustain the judgment the court has not followed legal proceedings according to those rules and forms which have been established for the protection of private rights.

The law of the land has thrown around a wife certain safeguards so that when a wife delivers her property to her husband it cannot be held that a delivery in and of itself raises a presumption of a gift. The legal presumption is that it is not a gift and that the husband holds his wife's property as trustee for her or that it is a loan.

It must appear that a gift is clearly intended. The courts have held that even more than a persuasive argument to obtain a gift will invalidate it and yet in spite of such safeguards thrown around a wife by the courts of our country, including this Honorable Supreme Court, in the instant case—Mrs. O'Hara, wife of a man who has been judicially decreed "a slippery calculating" individual "full of guile

and treachery" by the Master in his report, is now confronted with the great danger of being bereft of her property in violation of the law of the land as enunciated by this Honorable Supreme Court and in violation of her constitutional right that she should not be deprived of her property without due process of law.

We respectfully submit that the Circuit Court of Appeals, First Circuit "has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the lower court, as to call for an exercise of this Honorable Court's power of supervision in the instant case".

We respectfully submit that by taking her property away from her without any legal evidence furnishing a basis therefor, and by forcing a decision upon her that she made a "gift" of her property to her husband without any legal evidence supporting such a finding, Mrs. O'Hara is having her property taken away from her without due process of law.

CONCLUSION

We respectfully petition this Honorable Court to grant Mrs. O'Hara's petition for a writ of certiorari.

This case presents a situation where, without relief to which she is justly entitled, the wife of a man who wrongfully deceived her will be forced to suffer innocently.

For the aforegoing reasons, it is respectfully submitted that the judgment of the Circuit Court of Appeals of the First Circuit is clearly erroneous and should be reversed.

Respectfully submitted,
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(14)

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No. 440

Supreme Court of the United States.

OCTOBER TERM, 1943.

ROSE M. O'HARA, *Petitioner*,

v.

MAURICE J. MURPHY, SPECIAL ADMINISTRATOR, ET AL., *Respondents*.

BRIEF OF RESPONDENT MAURICE J. MURPHY, SPECIAL ADMINISTRATOR, OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

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Special Administrator,
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INDEX.

	Page
Statement of matter involved and issues	1
Argument	2
I. There was ample evidence that the petitioner relinquished her rights to said policies	2
II. There has been no violation of Article V of the Amendments to the Constitution of the United States	3
III. The issuance of a writ of certiorari is discretionary	4
IV. Erroneous contentions made by the petitioner in her petition for a writ of certiorari	5
Conclusion	5

TABLE OF AUTHORITIES CITED.

Boehmer v. Pennsylvania Railroad Company, 252 U.S. 496	4
Green County, Kentucky, v. Thomas' Executor, 211 U.S. 598	4
Helis v. Ward, 308 U.S. 365	4
Hyde v. Shine, 199 U.S. 62	4
Philadelphia & Reading Coal & Iron Company v. Gilbert, 245 U.S. 162	4
Federal Interpleader Act, Judicial Code, secs. 24, 26, as amended; 28 U.S.C. sec. 41 (26)	2

Supreme Court of the United States.

OCTOBER TERM, 1943.

ROSE M. O'HARA, *Petitioner,*

v.

MAURICE J. MURPHY, SPECIAL ADMINISTRATOR, ET AL., *Respondents.*

BRIEF OF RESPONDENT MAURICE J. MURPHY, SPECIAL ADMINISTRATOR, OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

This respondent, Maurice J. Murphy, opposes the granting of a writ of certiorari to review the final judgment of the Circuit Court of Appeals for the First Circuit, entered July 9, 1943, confirming the judgment of the United States District Court for the District of Massachusetts in favor of the respondent.

Statement of Matter Involved and Issues.

The litigation in question involves the right to the proceeds of two insurance policies on the life of Walter E. O'Hara, deceased. The Insurance Company paid into

court the said proceeds, under the Federal Interpleader Act, sections 24 and 26 of the Judicial Code, as amended; 28 U.S.C. sec. 41 (26).

A judge of the District Court of the United States for the District of Massachusetts ordered judgment entered for the respondent on a special master's report; the Circuit Court of Appeals for the First Circuit confirmed the judgment of the District Court of the United States.

The sole material issue involved is whether there was evidence upon which a finding of fact could have been made that the petitioner relinquished any pre-existing rights she may have had to the proceeds of said policies.

Argument.

I. There was Ample Evidence that the Petitioner Relinquished Her Rights to Said Policies.

In this respect the evidence was conflicting. The petitioner denied that she ever relinquished her interest in said policies. The respondent offered evidence to show that the deceased, Walter E. O'Hara, demanded the return of the insurance policies, and engaged Patrick H. Harrington, Esquire, to represent him in this matter. The petitioner engaged Harry P. Cross, Esquire, to represent her. At this time a divorce between the parties was contemplated, and, preliminary thereto, the parties made claims to certain properties. The return of the policies was an incident of the contemplated divorce. On September 21, 1940, the negotiations culminated in the return of the policies of insurance to Walter E. O'Hara. The petitioner willingly returned the policies; her counsel assented thereto. The petitioner, with full knowledge of the legal consequences thereof, and in pursuance of previous arrangements and

an understanding, relinquished all of her right to the proceeds of said insurance policies.

The testimony of the following witnesses supports such a finding: Patrick H. Harrington, Esquire; Harry P. Cross, Esquire; and John W. Broadbent.

The petitioner denied she relinquished her rights to said policies; the finding of fact discards her testimony as unworthy of credence. Her testimony was contradicted by the witnesses above mentioned, to wit, Messrs. Harrington, Broadbent, and Cross.

The conduct of the petitioner in fact, and in law, effected a complete relinquishment of any rights she had in said insurance policies.

The policies, at the death of said Walter E. O'Hara, were payable to his estate; his representative, the respondent, is entitled to the proceeds thereof.

The statement in the petitioner's brief that there was no evidence as to such relinquishment is palpably wrong.

II. There has been No Violation of Article V of the Amendments to the Constitution of the United States.

The petitioner had the right, and the opportunity, and was heard in her effort to enforce her alleged claim to the insurance policies in question. This issue was fully heard by a special master; it was reviewed by the District Court of the United States for the District of Massachusetts; and was heard by the Circuit Court of Appeals of the United States for the First Circuit. Each of the claims in her instant brief concerning the lack of evidence as to the relinquishment of rights to the policies was argued before said courts. There was a plenitude of evidence to support the findings of fact as to this issue. The peti-

tioner had her day in court and has not been deprived of due process of law contrary to the Fifth Amendment. "Due process of law is not concerned with mere afterthoughts."

Helis v. *Ward,* 308 U.S. 365.

This Court should not disturb the findings of fact supported by the evidence made by the District Court of the United States and the Circuit Court of Appeals; this Court need not enter into "a minute analysis of the evidence."

Boehmer v. *Pennsylvania Railroad Company,* 252 U.S. 496.

III. The Issuance of a Writ of Certiorari is Discretionary.

The writ of certiorari should be refused in the exercise of a sound discretion. *The issues raised by the petitioner raise no question of law;* the facts have been found in contradictory evidence, and therefore the petitioner's conduct tends unnecessarily to delay a final ending of this case.

Green County, Kentucky, v. *Thomas' Executor,* 211 U.S. 598.
Hyde v. *Shine,* 199 U.S. 62.
Philadelphia & Reading Coal & Iron Company v. *Gilbert,* 245 U.S. 162.

The findings which have been made are supported by the evidence and should not be disturbed, in the exercise of a sound discretion.

IV. Erroneous Contentions Made by the Petitioner in Her Petition for a Writ of Certiorari.

The statement of the petitioner on page 3 that "This case does not present a question of whether or not there is credible or conflicting evidence" is erroneous. A study of the evidence shows that the evidence on the sole issue of the relinquishment of the insurance policies was highly conflicting. The special master and the District Court of the United States and the Circuit Court of Appeals clearly show this, and, in effect, find as a fact that the petitioner testified falsely. Other similar references on succeeding pages to the effect that there was no evidence of a relinquishment by the petitioner of her rights in the policies are gross misstatements of the evidence and the facts found.

It is noted that on page 7 the petitioner admits conflicting evidence as to the delivery of the policies on September 21, 1940. The evidence and the facts found establish that the petitioner made such delivery with an intent to relinquish all rights in the insurance policies in question.

Conclusion.

The respondent respectfully petitions this Court to deny the issuance of the writ of certiorari.

The case was fully heard on conflicting evidence. No question of law is raised. The exercise of a sound discretion compels the denial of the petitioner's request.

MAURICE J. MURPHY,
Special Administrator,
Pro Se.

DEC 2 1943

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 440

ROSE M. O'HARA, Petitioner

vs.

MAURICE J. MURPHY, Special Administrator, et al.
Respondent

REPLY BRIEF FOR PETITIONER

ROSE M. O'HARA,
By WALTER I. SUNDLUN
WILLIAM C. CROSSLEY
Attorneys for the Petitioner

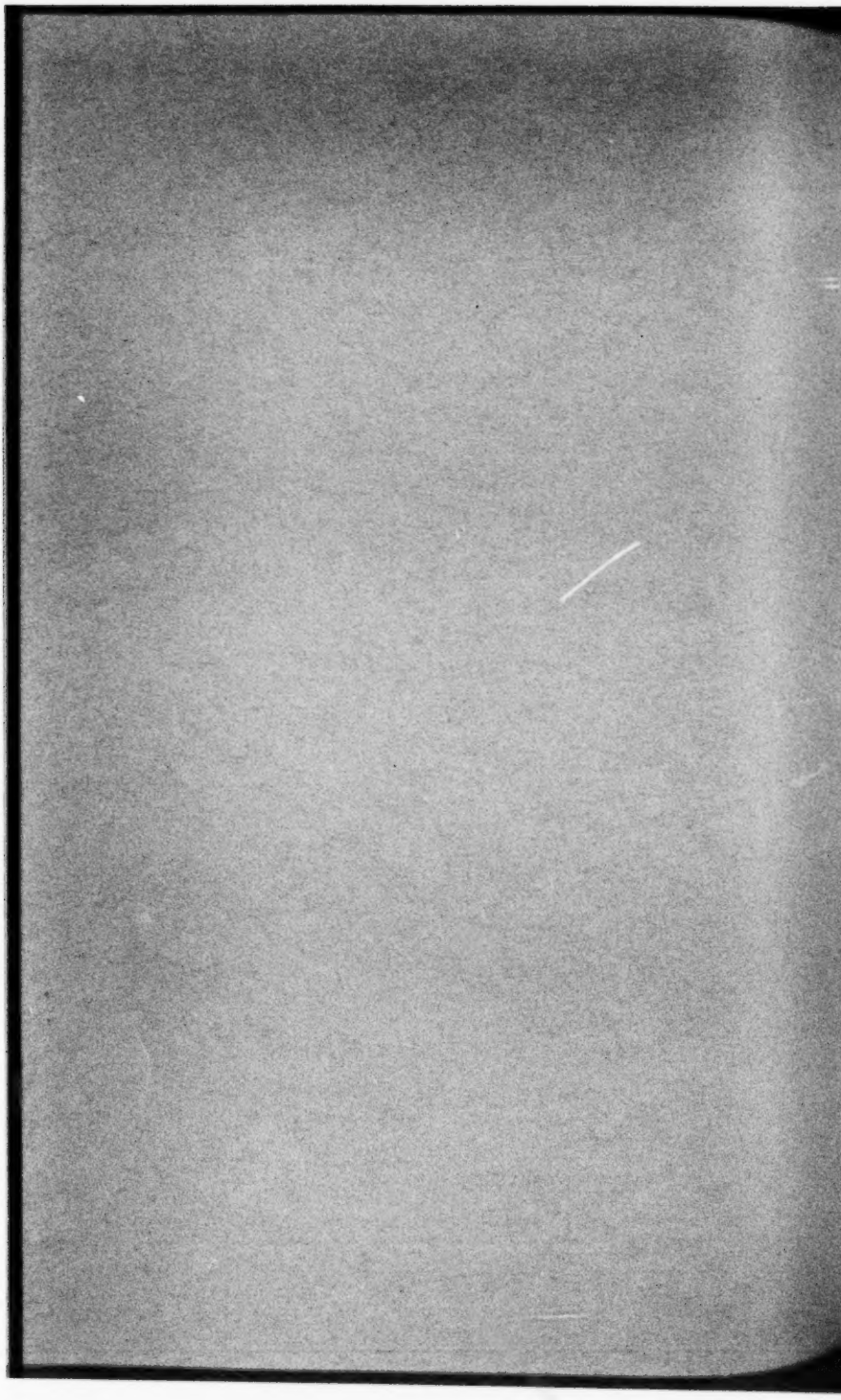

TABLE OF AUTHORITIES CITED

PAGE

Bagley et al. vs. *M. M. Page*, 57 R. I. 186..... 13

22 Corpus Juris, p. 65, Sec. 8..... 13

Kaycoga Land Co. vs. *Ky. River Coal Corp.*, 110 F. 2d, S. P. 896—CCA 6th Circuit..... 14

Stickney vs. *Stickney*, 131 U. S. 227.....7, 14, 18

U. S. vs. *Ross*, 92 U. S. 281, 284..... 16

In the Supreme Court of the United States

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No. 440

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vs.

MAURICE J. MURPHY, Special Administrator, et al.
Respondent

REPLY BRIEF FOR PETITIONER

The respondent admits in his brief on page 2 that

> "the sole material issue involved is whether there was evidence upon which a finding of fact could have been made that the petitioner relinquished * * * her rights to the policies".

The respondent has now shifted his position three times in this case. His first position before the Master was that Mrs. O'Hara never acquired title to the policies; that they were always the property of Mr. O'Hara and therefore now part of his estate. The respondent never admitted before the Master that Mrs. O'Hara acquired title to the policies or claimed that Mrs. O'Hara made a gift of them to her husband.

It was only after the Master found, *without there being any evidence in support thereof,* that Mrs. O'Hara returned

the policies to her husband as a gift "pursuant to an arrangement worked out by counsel" that the respondent adopted that position also. The record shows conclusively that the only tentative arrangement worked out by counsel was predicated solely upon a divorce and financial settlement taking place. (See testimony of Atty. Cross and Atty. Harrington in this brief. Pages 10, 11, 12.) The petitioner firmly states that she never made a gift of the policies as claimed and that the *record contains no evidence to support the finding of a gift, as made by the Master.*

The said U. S. District Court does not discuss the facts in its opinion. If it had, it could never have arrived at its conclusion. It construed the report of the Master to mean that Mrs. O'Hara made a "gift back" of the policies to her husband. The respondent thereafter for the first time adopted the "gift back" theory. Thus he shifted his position from his original one.

After the said U. S. Circuit Court stated "the sole issue is whether Mrs. O'Hara relinquished all her rights in the two insurance policies", the respondent then took his third position and adopted the theory enunciated by the latter court, namely that Mrs. O'Hara "relinquished" her rights to the policies.

There is no evidence in the record to sustain this conclusion unless, from the mere and naked evidence of the alleged delivery as claimed by the witness Broadbent (*infra*) this Honorable Court will say that such evidence is enough to furnish a basis to hold that Mrs. O'Hara made a "gift back" of the policies to her husband on September 21st, and that she thereby "relinquished" her rights to them. We maintain the law requires direct, positive and clear evidence and such evidence *is not to be found anywhere in the record.*

The U. S. Circuit Court likewise does not discuss the facts in its opinion.

The petitioner strongly maintains that if either court would have only treated with the facts in their respective opinions—each court would respectively find that the positive uncontradicted and undisputed testimony, and that the record as a whole, does not present any facts to support the finding of a "gift back" from Mrs. O'Hara to her husband.

It is vitally necessary that this Honorable Court be given a correct statement of the record. The respondent states on page 2 of said brief as follows:

> "* * * The respondent offered evidence to show that the deceased, Walter E. O'Hara, demanded the return of the insurance policies, and engaged Patrick H. Harrington, Esq., to represent him in this matter."

There is no evidence to support the above allegation that a demand was made. The record does not contain any evidence which even presents a basis for a demand by O'Hara for the policies.

The record shows without contradiction that while the attorneys were negotiating for a divorce and settlement, O'Hara, without notifying either of the lawyers, sent Kilbourne, his closest friend and business associate, on September 14th, to request the policies from Mrs. O'Hara. She refused to give them up. Thereupon O'Hara's art of deception sprang into action. On the same day he phoned and later wrote the Insurance Company and represented to its representative that he had lost the policies and asked for duplicate policies. (R. 323.) When told he would have to support his claims with a sworn affidavit, he became abusive and threatened the Insurance Company that he would stop it from doing business in Rhode Island and Massachusetts unless it promptly issued new policies to him. (R. 492-494.) (Ex. 29, 30.) He never gave the affidavit for he knew that if he did, he would be guilty of perjury. (Ex. 36.)

The evidence established, that O'Hara was a treacherous character, that he never gave up once he decided to accomplish a given result; that he was "ruthless and unscrupulous when necessary to obtain his ends". (Master's Report 45.) (R. 839-841, 842, 843.)

O'Hara thereupon promptly changed his tactics *to wrest* the policies away from his wife. On September 15, he instructed Atty. Harrington to help him get the policies from his wife. (R. 815, 816.)

While the negotiations for the said divorce and settlement between counsel for the parties were going on, O'Hara repeatedly tried to see his wife and deal directly with her. He even ignored his own lawyer Patrick Harrington and tried to deal directly with Atty. Cross also. (Ex. 38.) Atty. Harrington admitted that this was O'Hara's way of doing business particularly in family matters. (R. 793, 794.)

While the attorneys were negotiating, O'Hara kept sending his wife many messages pleading forgiveness. (Exs. 10, 16, 17, 18, 19, 45, 46.) He finally broke down his wife's resistance and got her permission to call on her.

Re: September 21, 1940

The *undisputed evidence* established that on the morning of Sept. 21, 1940, O'Hara telephoned his wife just *once* and made arrangements *with her* to send for certain confidential, financial statements and some suitings which were at the Providence home. Mrs. O'Hara agreed. (R. 85-89.) He also notified his wife in that *one and only phone call* that he was sending some furniture which had been taken out of their summer home the night before (the summer season was over and they had to vacate their cottage).

Immediately after the said telephone call, Tony, a truck driver who worked for O'Hara, arrived from Fall River at

the Providence home and after leaving a few small articles for their home, he carried the bulk of the furniture back to the Fall River Mill for storage where it still remains. Mrs. O'Hara took nothing for her own personal use. There was no division of property. (R. 142.)

Tony, before leaving, also gave Mrs. O'Hara a letter which O'Hara *wrote* and *sent directly after* the said telephone call. (R. 326, 328.) It contained the following paragraph.

> (Ex. 10.) "Darling * * * I love you with all my heart, and my absence from you is doing nothing short of killing me. *So you can keep the insurance policies. I rather that you had the proceeds than anyone else in the world.*
>
> Your loving husband
>
> Walter."

Within a few minutes *after* the delivery of the letter, (Ex. 10) Mr. Kilbourne arrived with Mr. Broadbent, employee for O'Hara, at the home of Mrs. O'Hara *just as Tony was leaving the neighborhood of the O'Hara home* for his return trip to Fall River. (R. 336.)

—Happenings at Mrs. O'Hara's Home—
—September 21, 1940—

Kilbourne contradicts Broadbent's story regarding the delivery of the policies on September 21. Both Broadbent and Kilbourne testified they made no request, nor did they even mention the policies to Mrs. O'Hara while at her home. (R. 87, 330.) Both admit that shortly after their arrival, Mrs. O'Hara handed Mr. Kilbourne a sealed envelope with instructions that it be given to Mr. O'Hara. (R. 330, 694,-696); that not a word was said by anyone present respecting the contents of the sealed envelope. Broadbent admitted that during the

aforesaid visit, he did not ask for anything; nor did he enter into the conversation then held; he did not tell Mrs. O'Hara what he came for. (R. 706, 707.); that Mrs. O'Hara expected them and knew what they wanted. (R. 571.) Mrs. O'Hara served them lunch and the two men thereafter departed to return to O'Hara.

Mrs. O'Hara swore that the sealed envelope which she delivered to Mr. Kilbourne for Mr. O'Hara contained certain confidential financial statements of the Annawan Mill, and a cancelled check for $20,000. (R. 89.) The contents of the sealed envelope were called "papers" by Mrs. O'Hara and Broadbent. Broadbent stated that Mrs. O'Hara got the "papers" and gave them to Kilbourne. (R. 696.) No one referred to the contents of the envelope as insurance policies at any time on Sept. 21, 1940.

There is nothing in record in contradiction of the evidence that Mr. Kilbourne is a trustworthy person. He is established as the closest and most trusted friend and confidant of O'Hara; as a tax expert consultant and member in good standing of the U. S. Treasury and Customs Bars for eighteen years, (R. 209, 210), also that Kilbourne had full authority to act for him under a proxy signed by O'Hara valued at $225,000, (Ex. 44); that Kilbourne won two jeopardy tax assessment suits for O'Hara involving $290,000, (R. 306, 308, 683) and that he now has a claim against the O'Hara estate for the latter services. Kilbourne corroborated Mrs. O'Hara, that the only articles in the sealed envelope were the confidential business statements and cancelled check. (R. 337.) Kilbourne denied that O'Hara sent him for policies or that he received policies on Sept. 21st (R. 446, 448.) He swore that it was *O'Hara who opened the sealed envelope* when he delivered it to him in Fall River. (R. 337.)

Broadbent said it was he who ripped open the sealed envelope after he left Mrs. O'Hara's home and that he then

saw the policies in the envelope. *It was only upon this testimony and the testimony of Harrington who said he saw them later at O'Hara's office that the Master concludes a delivery which passed title to the policies.*

There is no testimony to define this delivery as a gift!

Broadbent, when asked to describe the envelope he claims to have opened, could not do it, nor could he tell whether there was any writing on the outside thereof. (R. 689.) Miss Genevieve Foley, private secretary to Mr. O'Hara, swore that Broadbent was definitely prohibited by Mr. O'Hara from opening private or sealed mail addressed to Mr. O'Hara. (R. 761, 764.)

There is no evidence in support of Broadbent except that of Atty. Harrington who testified no further than to say that he saw the policies in O'Hara's possession on Sept. 21st and that O'Hara said he was "G— D— glad to get those policies."

The petitioner respectfully maintains that the aforesaid does not present any legal evidence and basis, even if the petitioner must now be burdened with the weight of the finding that a delivery of the policies, as claimed by Mr. Broadbent, was made on Sept. 21st, to support a finding that such delivery constitutes the making of a gift of the policies by Mrs. O'Hara to Mr. O'Hara as required by law.

Stickney vs. *Stickney, supra,* 131 U. S. 227

Mr. Kilbourne flatly contradicts Broadbent's story. He swore that "*Broadbent never had his hands on that envelope*". (R. 976.) He branded Broadbent's story as false. (R. 973, 974, 975.) Kilbourne has no motive or interest to cause him to so testify except to tell the truth.

Kilbourne testified that when they returned to O'Hara, Atty. Harrington was not there. (R. 336, 454.) Miss Foley corroborated Kilbourne. (R. 995, 996.)

It is very significant that Atty. Harrington who had to admit he has a large financial stake in this case, is the only one who corroborates Broadbent and then in part only and that Broadbent is the only one who corroborates Harrington in part only. Broadbent admitted in cross-examination, that he conferred with Atty. Harrington as much as 36 separate times about appearing as a witness in this case. (R. 703, 704, 748.)

Broadbent's and Harrington's testimony about the alleged delivery *does not prove in law a gift of the policies by Mrs. O'Hara to her husband,* or that she gave up her title to them, as a result of an agreement arranged for by counsel even if full credence is given to their agreed stories. Such delivery alone does not pass title!

Mrs. O'Hara swore that she "entrusted" the policies to her husband on Sunday, September 22nd, for an express purpose only, (R. 148, 149, 179, 180, 225, 226, 229) and with *no intention to part with her title to them.* (R. 225-229.)

Continuing on page 2, the respondent states in his brief:

> "The petitioner engaged Harry P. Cross, Esq., to represent her. At this time a divorce between the parties was contemplated, and, preliminary thereto, the parties made claims to certain properties. The return of the policies was an incident of the contemplated divorce * * *".

Here we have the respondent's admission that the return of the policies was to be part of the said contemplated divorce.

The respondent continues on page 2 of his brief as follows:

> "On September 21, 1940, the negotiations culminated in the return of the policies of insurance to Walter E. O'Hara. The petitioner willingly returned the policies; her counsel assented thereto * * * ".

There is *no testimony in the record supporting the latter statement that Mrs. O'Hara "willingly returned the policies" gratuitously!* We repeat again—let the respondent point out one word—one sentence—on answer—in the record which will sustain the finding of a "gift back" and the petitioner will consent to a decree being entered against her in this case! She contends sincerely and earnestly—*there is no testimony of such character which the respondent can point to* in the entire record!

The petitioner admits she engaged Atty. Harry P. Cross, of Providence, R. I., as her counsel, solely for the purpose of obtaining a divorce and a financial settlement after her husband got drunk and assaulted her on Sept. 8, 1941 and that her attorney promptly began negotiations with O'Hara's attorney, Patrick Harrington, who claims now to be a large creditor against the estate of W. E. O'Hara, to obtain a divorce and such a settlement for her.

We admit that Mrs. O'Hara, through her attorney, did agree as part of said contemplated settlement and divorce that she would willingly give up the insurance policies, safe deposit key and other property, if a divorce and settlement were effected.

The respondent, on page 3 of his brief, states that:

> "The testimony of Patrick H. Harrington, Esq., Harry P. Cross, Esq., and John W. Broadbent support a finding of a gift, in pursuance of previous arrangements worked out by counsel and thereby Mrs. O'Hara relinquished all her rights to the policies."

This is an absolute misstatement of the record!

There is no testimony in the record supporting such a statement. We quote herein the testimony of Atty. Cross and Atty. Harrington on this very point so that this Honorable Court can see how truly baseless the conclusion thus made really is.

(Direct Exam. of Atty. Cross by Attorney for Administrator) (R. 525.)

22 "Q. What was the object of the conferences; what were you seeking if anything to accomplish? A. We were trying to arrange the matter of alimony and arrange for a divorce without unnecessary publicity between Mr. and Mrs. O'Hara. She to bring the divorce proceedings, and the terms were discussed and Reno was discussed; that was about the state of things on that date.

23 Q. Was the amount of alimony discussed? A. It has been from time to time and I find a memorandum here on the 21st, which was the first time any figure appears. There was a proposition of $5,000. payment to Mrs. O'Hara by Mr. O'Hara and she to get the divorce wherever she chose, I think it was. There has been another figure, I think a little larger than that, but Mr. O'Hara finally on the 21st of September, through Mr. Harrington, apparently made a flat proposition that he would do so much. (R. 526.)

* * *

26 Q. Without anything definite on any of their suggestions as far as you know? A. It got to the point on the 21st of September where I understand it was a flat proposition. We were inclined to accept it. (R. 527.)

* * *

(Cross-examination)

57 Q. Her visit to you engaging you as her counsel was at that time with a view of getting a divorce from Mr. O'Hara? A. That is correct." (R. 533.)

* * *

61 Q. At no time in your handling of the matter, then, was there a discussion that she would give any property back if there was no divorce? A. *Absolutely not.* (R. 535.)

69 Q. Also, Mr. Cross, I think you have answered it, but any discussion relative to division of furniture was also on the basis that there would be a divorce? A. Yes, *there were not any negotiations going on between Mr. Harrington* and me that were not looking towards settlement of their differences by divorce up to the 23rd of September, when it was that Mr. O'Hara asked for reconciliation. (R. 536.)

79 Q. When she did authorize you to say that she was willing to deliver or return them, was that also at that point with the thought in mind that there would be a divorce and a settlement made upon her with respect to her future? A. *There is no question about that.*" (R. 539.)

Clearly the lawyers were not negotiating to have their clients make gifts to each other.

(Re-direct examination of Atty. Cross)

88 "Q. I am trying to get the Master clear on it. A. *My understanding clearly was that none of this would have happened if a divorce had not been contemplated.* (R. 542, 543.)

* * *

(Cross-Exam. of Atty. Cross by Master)

114 Q. Yes. So far as that went, it did not make much difference whether the divorce went through or not; that is, as far as that went; that is a fair way to put it, isn't it? He was getting back his own property? A. Yes, but put it another way; if the divorce had not been contemplated, I don't think any giving back or recovery of property would have taken place. *In my mind it was all part of what was going on.*" (R. 552.)

* * *

118 Q. But apparently quite obviously from the letter the delivery or return of those policies was to be a part

of the adjustment that was to be made in connection with the contemplated divorce? A. *That was my understanding of the whole transaction.* (R. 552.)

There is *no testimony* in the record that O'Hara claimed the policies as his own *at any time* after May 1939. The entire testimony shows *only,* that O'Hara wanted and tried to *wrest* them away from his wife knowing all the time that they were his wife's property. (R. 405, 406, 441, 442.)

The safety deposit box key and the other articles referred to in Atty. Cross' letter (Ex. 37) *were never returned* as contemplated, for the negotiations by the attorneys were never concluded.

Atty. Harrington, likewise—though reluctantly—corroborated Atty. Cross that all negotiations between them were predicated upon divorce. He testified in part as follows:

331 "Q. Now in connection with your negotiations with Mr. Cross at that point, when you were negotiating with Cross it was clearly because Mrs. O'Hara had gone to her attorney at that time and wanted a divorce? A. Yes.

* * *

333 Q. All your discussions and conferences with him were on that subject matter, while you negotiated with Cross? A. I was seeking reconciliation, also. (R. 818.)

* * *

The record does not contain any evidence in contradiction of the above.

372 Q. She wanted a divorce? A. Of course. Harry Cross told me what she wanted was divorce, yes. I am not quibbling about that. I told you before that Harry Cross said that." (R. 822.)

As stated no divorce or settlement was ever concluded. They became fully reconciled as husband and wife.

Thus it must be clear that there is no evidence to support the statement as made by the respondent in this brief, or that the attorneys agreed that a gift should pass from Rose O'Hara to her husband.

The Master, at best, based his findings on inferences which are not drawn from proven facts.

He made serious tortious deductions contrary to the evidence in the record.

In the case of *Mary A. Bagley et al* vs. *M. M. Page,* 57 R. I. 186, the Supreme Court of Rhode Island held

> "On undisputed facts and testimony, the appellate court is in as favorable position as the trial court to draw inferences although the findings of the trial court are entitled to great persuasive force."

The Master has not only misapprehended the evidence but has made illogical findings. He has failed to apply the established law to the positive uncontradicted and unimpeached evidence in this case.

It is elementary that no finding can be made which is unsupported by evidence. No inference can be drawn from a supposed fact. His finding that Mrs. O'Hara gave up her title to the policies is predicated upon a series of inferences which he has drawn from other inferences which are unsupported by evidence or premises that are certain.

The inferences, so drawn, even contradict themselves. The Master had to make at least five such successive inferences in order to arrive at his ultimate conclusion that Mrs. O'Hara made a gift of the policies to her husband.

It is settled

> "that the law will not permit the drawing of an inference from a supposed fact of whose existence there is no direct proof."
>
> 22 *Corpus Juris,* p. 65, Sec. 8.

It has been held repeatedly

> "that where findings of a Master which are based wholly upon inferences, the reasonableness of which may be as fairly determined by the Court as by him, any presumption in favor of his conclusions can be of slight importance."
>
> *Kaycoga Land Co.* vs. *Ky. River Coal Corp.*, 110 F. 2d, S. P. 896—CCA 6th Circuit.

To illustrate, the Master found that O'Hara made *only one telephone call to his wife* on the morning of September 21. In this he was right. He then finds that during the said telephone call O'Hara "not unlikely met with some rebuff." *There is no testimony supporting this latter finding!* It is pure conjecture. The Master then finds that immediately *after* the said telephone call, over which O'Hara "likely received some rebuff," O'Hara wrote and sent the following letter to his wife (Ex. 10):

> "Darling: * * * So you can keep the insurance policies. I rather you had the proceeds than anyone else in the world. * * *
>
> Your loving husband,
>
> Walter."

The Master then proceeds to find that immediately *after* sending the letter (Ex. 10) O'Hara dispatched Kilbourne and Broadbent to get the policies from Mrs. O'Hara; that thereupon Mrs. O'Hara delivered the policies to Kilbourne in a sealed envelope; that in so doing, the Master found, that Mrs. O'Hara made a gift of the policies to her husband and thus divested herself of all her title to the same. The latter finding is a conclusion of law and is contrary to law as stated by this Honorable Court in *Stickney* vs. *Stickney*, 131 U. S. 227.

In order to arrive at these conclusions the Master had to make the following inferences:

> 1st. Inference—That the *one* and *only* telephone call of Saturday morning, September 21, *was of a nature other than that which had been established by positive and undisputed and unimpeached evidence.*
>
> 2nd. Inference—That Mr. O'Hara "met with some rebuff" over said *one and only* telephone call.

There is *no evidence* from which these two inferences can be drawn! The Master admits that these findings are inferred. (M. R. 66.)

> 3rd. Inference—That because of "some rebuff" O'Hara underwent a sudden change of mind towards his wife from that expressed by him in his letter Exhibit 10 which he sent to his wife directly *after* the telephone call over which he received the alleged rebuff.

There is *no testimony* supporting this latter inference! The Master then proceeds to even greater speculation and guess work and holds that O'Hara, counting on the *expected effect of the letter* (Ex. 10), did not get it, and thereupon he flew into a rage and dispatched Kilbourne and Broadbent post haste for the policies. What strained reasoning, if Mrs. O'Hara was making a "gift back" of the policies to her husband! What difference does it make whether or not he got the certain effect of his said letter? This does not furnish a basis for O'Hara taking away or demanding—his wife's property!

Let us test the Master's speculative reasoning further. How *could O'Hara possibly know* what the effect of his letter (Ex. 10) was upon his wife before Kilbourne or Broadbent returned to him from Mrs. O'Hara. Clearly until they returned O'Hara had no way of knowing what effect his letter had upon her!

4th. Inference—That because of the *inferred* change of O'Hara's attitude which was caused by the said inferred "rebuff", Mrs. O'Hara thereupon, immediately following the alleged rebuff, proceeded to make a gift of the policies to her husband.

5th. Inference—That at the time of the said alleged delivery of the said policies in the sealed envelope, Mrs. O'Hara intended to divest herself of her title to the policies.

There is *no testimony* establishing Mrs. O'Hara's intention as declared by the Master! There is *no testimony in the entire record* supporting the strained inferential findings of the Master. They are based upon conjecture and surmise and are contrary to the law and the evidence and the clear weight thereof. *There is no open visible connection between the inferences and the evidentiary facts.* The Master tries to explain away the letter (Ex. 10), which O'Hara sent immediately *after* the telephone conversation during which O'Hara is supposed to have met with some rebuff by calling it a "curious inconsistency." This letter was O'Hara's free act and it destroys the Master's inferential reasoning. The Master's premises for these inferences have no foundation in fact.

> The established law is that "an inference cannot be legitimately drawn from another inference or a rebuttable presumption, but only from premises which are certain." (*U. S. F. & Guaranty Co.* vs. *Des Moines National Bank,* 145 Fed. 273.)
>
> See *U. S.* vs. *Ross,* 92 U. S. 281, 284 (Quoted in first brief of petitioner.)

We respectfully hold that the Master has made a decision directly contrary to the established law. The Master forgot the established evidence and became confused for the chronology of events proves that his conclusion cannot logically be reached. It must be apparent that if O'Hara "lapsed into one of his savage fits of temper" because of "some rebuff"

which his wife is *supposed* to have given him during the said telephone conversation held the morning of Sept. 21 so as to cause him to rush Kilbourne and Broadbent to get the policies away from his wife, *and for which* there was no basis (they were properly), it follows that under such circumstances O'Hara would not directly *after* the telephone conversation, write to his wife immediately after the said rebuff: (Exhibit 10)

> "Darling:—* * * you can keep the insurance policies" and "I would rather you had the proceeds than anyone else in the world".

The said *letter* (Ex. 10), *in law* is *also an outright assignment and* waiver of all his rights and interests whatever they might have been at the time in the said policies. It was written and sent by O'Hara to his wife *after* the said *one and only telephone call!*

The policies have been adjudicated as the property of Mrs. O'Hara from May 1939 to and inclusive of Sept. 21, 1940. This finding is not challenged by the Administrator! The Master calls the said letter in his report (Ex. 10) "puzzling" (M. R. 66.) He thus admits he had doubt in his mind but since he had to guess or speculate, he resolved that doubt against Mrs. O'Hara instead of in her favor and thus acted contrary to the established law. Mrs. O'Hara, as a wife, was entitled to every reasonable doubt being resolved in her favor.

The burden of proof to prove Mrs. O'Hara's intention to give up her title to her property rested upon the Administrator. *There is no evidence in the record to overcome that burden!*

—GIFT FROM WIFE TO HUSBAND—

The policies having been determined to be the property of Mrs. O'Hara on Sept. 21, 1940, it thus became the duty and burden of the Administrator to overcome the presumption of

law that the policies in the possession of her husband were not so held by him as trustee for her.

The presumption of law that Mrs. O'Hara did not make a gift of the policies to her husband must be overcome by *clear direct evidence* to the contrary.

Stickney vs. *Stickney,* 131 U. S. 227.

Mere delivery proves nothing, let alone the fact of gift.

We respectfully say *there is nothing in the record*—to overcome the presumption that Mr. O'Hara held the policies as his wife's trustee.

We pray for an opportunity to point out to this Honorable Court the clear unmistakable fact that the Court below has clearly erred and by its decision violated Mrs. O'Hara's constitutional right.

In closing we urge again that respondent be obliged to point out to this Honorable Court the evidence in the record which will support a gift from Mrs. O'Hara to her husband.

Respectfully submitted,

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